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October 19, 2016

Ms. Marlene H. Dortch
Secretary
Federal Communications Commission
445 12th Street SW
Washington, DC 20554

**Re: Business Data Services, WC Docket No. 16-143
Special Access, WC Docket No. 05-25**

Dear Ms. Dortch:

On October 17, 2016, Jennifer McKee and Steve Morris of NCTA – The Internet & Television Association (NCTA) met with Claude Aiken, Legal Advisor to Commissioner Clyburn, to discuss the above-referenced proceedings. On October 19, 2016, we met with Travis Litman, Senior Legal Advisor to Commissioner Rosenworcel, to discuss the same proceedings.

NCTA reiterated its position that rate regulation of Ethernet services is unnecessary because a wide range of competing providers are investing billions of dollars in facilities to provide these services and prices have been declining steadily as a result of this intense competition.¹ Moreover, proposals in the record to “benchmark” Ethernet rates to rates for legacy services are indefensibly arbitrary and would cause significant harm to future investment in fiber networks by incumbent LECs and competitive providers.² We also suggested that any regulation of rates for TDM-based services should include a sunset date so as to encourage customers to transition to IP-based services.

NCTA also explained that cable operators often provide services to business customers on a private carrier basis and that the record does not provide any basis for a blanket conclusion that all business data services (BDS) are, or should be, offered only on a common carrier basis.

¹ Indeed, competitive providers now establish more new Ethernet connections (60%) than do incumbent LECs (40%). See Vertical Systems Group, Mid-Year 2016 U.S. Carrier Ethernet LEADERBOARD (Aug. 18, 2016), at <http://www.verticalsystems.com/vsglb/mid-year-2016-u-s-carrier-ethernet-leaderboard/>.

² See, e.g., Letter from Sam Feder, Counsel for Charter Communications, to Marlene H. Dortch, Secretary, Federal Communications Commission, WC Docket No. 16-143 (filed Oct. 3, 2016); Letter from Melissa Newman, Centurylink, to Marlene H. Dortch, Secretary, Federal Communications Commission, WC Docket No. 16-143 (filed Sept. 30, 2016); Letter from Christopher Shenk, Counsel for AT&T, to Marlene H. Dortch, Secretary FCC, WC Docket No. 16-143 (filed Sept. 16, 2016).

Specifically, we questioned the legal basis for a requirement to offer all BDS on a common carrier basis and explained that eliminating the option to provide services on a private carrier basis could discourage entry of new providers and introduction of new services. We also suggested that any order in this proceeding should reiterate that common carriers possess wide latitude to individually negotiate the rates, terms, and conditions of service pursuant to well-established Commission and judicial precedent.³

Finally, NCTA explained that there was no basis for requiring BDS providers to offer discounted wholesale service. In particular, NCTA explained that there was no basis for requiring BDS providers to offer lower prices to companies that use such services as inputs to other services, as INCOMPAS recently suggested.⁴ BDS providers do not control how their services are used and a mandatory obligation to distinguish among customers based on how services are used is at odds with the statutory scheme and unwarranted as a policy matter.⁵

Respectfully submitted,

/s/ Steven F. Morris

Steven F. Morris

cc: C. Aiken
T. Litman

³ See, e.g., Verizon Reply Comments at 30, *citing Orloff v. FCC*, 352 F.3d 415, 419-20 (D.C. Cir. 2003) (allowing individualized negotiation under sections 201 and 202 of the Act); Sprint Reply Comments at 67 (“as the Commission has held previously, individually negotiated sales are not uncommon for non-tariffed telecommunications services”); see also Letter from Curtis Groves, Verizon, to Marlene H. Dortch, Secretary, Federal Communications Commission, WC Docket No. 16-143 (filed Sept. 27, 2016) at 4 (“[A] common-carriage obligation does not equate to an obligation to build facilities where they do not currently exist.”).

⁴ See Letter from Angie Kronenberg, INCOMPAS, to Marlene H. Dortch, Secretary, Federal Communications Commission, WC Docket No. 16-143 (filed Oct. 13, 2016).

⁵ See, e.g., Letter from Curtis Groves, Verizon, to Marlene H. Dortch, Secretary, Federal Communications Commission, WC Docket No. 16-143 (filed Oct. 14, 2016).